IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 502 OF 1986

Adinath Bapuji Mangudkar
(since deceased, by his heirs
and legal representatives):
1) Padmakar Adinath Mangudkar
(since deceased through his
heir and legal representatives):

(1-A) Padmaraj Padmakar Mangudkar,
At Plot No.RM-19, Flat No.7,
Sudamnagar Road No.5, MIDC
Residential Zone, Dombivli (E),
Dist. Thane.

2. Sou Sindhutai Ratanlal Korde,
At 31, Goldfinch Peth,
Nr. Indira Prashala, Solapur. ... Appellants.

V/s

1. Jaykumar Gopinath Kshetrapal,
R/at Madha, Dist. Solapur. ... Respondent

ALONGWITH

SECOND APPEAL NO. 506 OF 1986

Adinath Bapuji Mangudkar
(since deceased, by his heirs
and legal representatives):
1) Padmakar Adinath Mangudkar
(since deceased through his
heir and legal representatives):

(1-A) Padmaraj Padmakar Mangudkar,
At Plot No.RM-19, Flat No.7,
Sudamnagar Road No.5, MIDC
Residential Zone, Dombivli (E),
Dist. Thane.

2. Sou Sindhutai Ratanlal Korde,
At 31, Goldfinch Peth,

Nr. Indira Prashala, Solapur. ... Appellants.

V/s

1. Jaykumar Gopinath Kshetrapal,
R/at Madha, Dist. Solapur.

2. Sou. Alka Abhaykumar Purwat,
R/o Hume Pipe Co. Ltd. Staff Quarters,
Antop Hill, Opp. Antop Hill Bus Stop,
Mumbai - 37. ... Respondents

Mr. A. A. Kumbhakoni for the appellants in both appeals.

Mr. R.M. Agrawal for the respondent No.1 in both appeals.

Mr. M.A. Choudhari for the respondent No.2 in Second Appeal No. 506 of 1986.

CORAM: P.V. KAKADE, J.

DATED: 9TH JUNE, 2005.

ORAL JUDGMENT:

1. Both these appeals are taken up for hearing and are being disposed of by this common judgment as the issues involved as well as the property in question and the parties to the dispute are one and the same.

2. The appellant in both the appeals has filed the present appeals against the judgment and order dated 16.11.1985 passed by the 4th Addl. District Judge, Solapur in Civil Appeal No. 150 of 1982 and 151 of 1982 and allowing the cross-objection in Civil Appeal No. 150 of 1982. Both these appeals were against the

judgment and order passed by the lower Court in Regular Civil Suit Nos. 68 of 1972 and 154 of 1970 in respect of the suit property. One suit was for specific performance of the contract, whereas the other suit was for possession of allegedly encroached land which was part of the same property. Both these suits came to be dismissed, for which the appeals in the lower appellate Court were referred, however, those appeals were also dismissed and hence the present appeals.

3. The facts giving rise to the dispute, in brief, are thus -

Plaintiff Adinath Bapuji Mangudkar filed R.C.S. No. 68 of 1972 on 22.4.1972 for the specific performance of the contract dated 27.10.1964 to reconvey the sale deed in respect of the suit properties in his favour and for the possession of the same alongwith the costs of the suit. Plaintiff Adinath also filed R.C.S. No. 154 of 1970 on 20th July, 1970 for possession of the suit properties alongwith past, pending and future mense profits alongwith costs against the defendants. Both the suits of the plaintiff were dismissed by the judgment and decree dated 30.11.1981. The unsuccessful plaintiff had preferred said appeals and respondent Jaykumar Gopinath

Kshetrapal had also filed cross-objection in Civil Appeal No. 150 of 1982 challenging the finding of the learned lower Court on the point of repairs and construction charges and for not allowing the cost of the suit to him.

4. Plaintiff's case in R.C.S. No. 68 of 1972 was that, the suit properties were comprised of Grampanchayat House Nos. 311, 312 and 313 of Village Madha. The defendant came to the possession of the suit properties by virtue of sale deed executed by Dinanath Bapuji Mangudkar for Rs.1000/- on 27.10.1964. The plaintiff had original interest in the suit properties but he did not have money to purchase the properties, therefore, it was decided that the suit properties were to be purchased by taking money from the defendant, who was his sister's son (nephew) in his name for the plaintiff and in purchase of that the agreement in between the plaintiff and the defendant took place that the defendant should pay Rs.1000/- to Manikchand Tuljaram Shah for redeeming the suit properties from mortgagee Manikchand Shah. Likewise, the defendant should pay Rs.500/- to Manikchand Shah and Dinanath Bapuji Mangudkar. After the payment of the said amount, the defendant should get the sale deed executed in his

name for the plaintiff. It was also agreed that the defendant would reconvey the suit properties to the plaintiff after three years from the date of getting the possession of the suit properties by the defendant and thereafter within five years on their payment of aforesaid amount of Rs.1500/- by the plaintiff or his son to the defendant and the defendant should execute the sale deed in favour of the plaintiff and hand over possession of the same to him. During the period of possession of the suit properties, the defendant was to receive the rent of the suit properties and he was to pay Grampanchayat taxes. The defendant was to effect necessary repairs to keep the suit properties in tenantable condition and the plaintiff was to pay repairing expenses incurred by the defendant, at the time of reconveyance deed in his favour to the defendant. On these terms and conditions, the defendant executed the agreement in favour of the plaintiff on 27.10.1964. On aforesaid conditions, on 27.10.1964 the defendant purchased the suit properties in his name and paid Rs.1000/- (mortgage amount) to Manikchand and Dinanath and obtained the possession of the suit properties and started using the same. The plaintiff was ready to repay Rs.1500/- and repair expenses after three years and thereafter within 5 years to the

defendant as per the agreement but the defendant had made new constructions in the said properties and plaintiff came to know that defendant decided not to comply with the agreement. Hence notice was issued but it was replied denying the claim. Hence the suit for specific performance of the contract came to be filed.

The plaintiff also filed R.C.S. No. 154 of 1970 on the ground that he was the owner of the suit house admeasuring 16 ft. x 9 1/2 ft. alongwith one latrine and open space situated at Shukrawar Peth, Madha. The defendant was his near relative. The plaintiff had his ancestral house towards the Western side of the suit house but the said ancestral house was transferred in the name of the defendant due to some difficulties and the defendant took disadvantage of the said fact in 1965 and unlawfully encroached upon the suit house and started saying that he was the owner of the same and the defendant did not have any right on the suit house. The plaintiff asked him to vacate the suit house but he refused to hand over the possession of the same. Hence the suit came to be filed against the defendant.

5. Both the suits were contested by the defendant. It was the case of the defendant in the lower Court that he

was in need of the property of his own and, therefore, had purchased the said property from Dinanath. According to him, Bapuji Mangudkar had became full owner of the suit properties and same were in possession of the defendant as an owner thereof from the date of his purchase. He spent more than Rs.20,000/- for repairs and new construction and the plaintiff had knowledge about the construction. The construction work was going on from 1964 to May-June 1970. However, the plaintiff did not raise any objection to that but after the completion of the construction, the plaintiff raised objections mischievously. On such and other grounds, in the other suit for possession also he denied the allegations made by the plaintiff and submitted that no encroachment has taken place in that regard.

The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that, in both the suits the plaintiff had failed to establish his right to have specific performance of the contract. It was also held in other suit that there was no encroachment proved by the plaintiff and, therefore, the suit for possession also came to be desisted.

6. The lower appellate Court endorsed to the findings

recorded by the Trial Court except for other small details pertaining to the quantum of amount spent on repairs but confirmed the findings recorded by the lower Court and dismissed the appeal. Hence the second appeal came to be filed.

7. At the time of admission of both appeals, the main appeal i.e. Second Appeal No. 502 of 1986 was admitted and substantial question of law was raised to the effect as to the rights of parties vis-a-vis the agreement to reconvey. The sister appeal i.e. Second Appeal No. 506 of 1986 was also admitted on the ground that the accompanying appeal which was admitted would have significant bearing on sister appeal also.

8. I have heard the learned counsel for the appellant as well as the respondent. At this juncture, it may be noted that the original defendants have sold the property to the present respondent No.4 (i.e. respondent No.2 in Second Appeal No. 506 of 1986) and, therefore, respondent No.4 is the only contesting party in these appeals. The learned counsel for the appellant took me through the judgments of both the Courts below as well as the relevant record and evidence from which it is apparent that the moot question round which the

entire case revolves is the interpretation of the suit document i.e. the agreement dated 27.10.1964 (Exh.69). Evidently, there was an agreement Exh.69 on 27.10.1964 between the plaintiff and defendant. It is also to be noted that the agreement came into existence as the plaintiff was maternal uncle of the defendant. Defendant Jaykumar testified that he should reconvey the suit property to the plaintiff or his son if the plaintiff or his son paid original price and repairing and construction expenses to him. As against this, the plaintiff Adinath testified that his brother Dinanath paid Rs.1000/- to Manikchand Shah for redeeming the suit properties. He has also admitted that he has no evidence to show that he paid Rs.1000/- to Manikchand. His original document dated 27.10.1964 is in vernacular and the relevant portion thereof would show that it was decided between the parties that the amount of Rs.1500/- and repairing as well as construction costs would be paid after three years from the date of execution but within five years thereof in order to reconvey the property. Subsequently, again it is mentioned that the amount of Rs.1500/- and repairing charges were to be paid at the time of reconveyance. The bone of contention between the parties is, whether both these statements in the said document are sufficient to hold

that the party in question was liable to pay the repairing as well as construction charges or only repairing charges besides Rs.1500/-. In that regard, the learned lower appellate Court has come to the conclusion that the plain reading of the document shows that the plaintiff also agreed to pay construction charges besides repairing charges as well as the amount of Rs.1500/- for the purpose of reconveyance of the property. In support of his said interpretation, cogent reasons are recorded by the learned appellate Court Judge. In this regard, on critical perusal of the document itself, I propose to agree with the learned lower appellate Court Judge. This is plainly due to the reason that unless and until it was agreed that construction cost was also to be included for repayment, there was no reason to make mention of "construction cost" besides repairing charges and amount of Rs.1500/-. So also, while subsequently mentioning the amount of Rs.1500/- besides repairing charges, the sentence is also qualified by words "as per written above". This aspect would clearly show that construction charges were all implied and the intention of the parties while executing the document was to include construction charges besides repairing charges and amount of Rs.1500/-. The learned counsel for the appellant

submitted that proper interpretation of the impugned document would be that the word "construction" was used and always meant to be in the nature of repairing charges. In support of this argument, he sought to rely upon the doctrine of *'nonscitur ex socio',* meaning thereby, the word is to be judged by the company it keeps. With the help of this maxim, it was sought to be argued that the word construction was always used and meant to be used for the purpose of construction pertaining to repairs and no independent construction besides repairs. I prefer to disagree with this submission for more than one reason. Firstly, the wording of the document is quite plain to show that repairs and construction charges were definitely having two different connotations to both parties and as can be seen from the contents which are very much clear. Secondly, it cannot be overlooked that the construction was evidently going on from the year 1964 till 1970, however, the plaintiff evidently did not raise any objection while defendant was making such construction. This inaction definitely goes to show that plaintiff, while executing the document was well aware of the fact that construction was contemplated alongwith repairs by virtue of the recitals of the suit document. Therefore, I am in agreement with both the Courts below while they

have held that the construction cost was part and parcel of the contract besides repairs and amount of Rs.1500/- which was earlier paid.

9. The lower Court also has concluded that the plaintiff was not ready and willing to perform his part of the contract. The evidence on record shows that the plaintiff always showed his willingness to pay the amount of Rs.1000/- but disputed the payment of further amount of Rs.500/- allegedly on the ground that the amount of Rs.600/- was paid to the defendant earlier. The defendant has challenged this version stating that the amount of Rs.600/- was towards handloan and had no connection with the suit transaction. However, the fact remains that it is word against word and, therefore, it cannot be held otherwise, in absence of any documentary or cogent evidence, that the amount of Rs.6000/- was given towards part performance of the contract and was part of the amount of Rs.1500/- which was to be paid at the time of reconveyance. Therefore, I am inclined to hold that it is not a fit case to interfere when both the Courts below have come to the conclusion that the plaintiff has failed to show that he was ready and willing to perform his part of the contract.

10. Mr. Kumbhakoni, learned counsel for the appellant finally submitted that he would be happy if conditional order is passed to the effect that the construction cost, even at present market, which would be fixed by the Court, would also be paid by the plaintiff. However, when it is already held that the plaintiff has failed to establish that he was not ready and willing to perform his part of the contract, no question arises of passing any conditional order, especially in the dispute which has genesis in the transaction of 1964 and both the parties are contesting since the year 1972. Moreover, it also cannot be overlooked that the original respondent No.4 is purchaser from original defendant and, therefore, the interest of the respondent No.4 should not suffer only due to the fact that now plaintiff has shown his willingness to pay the construction charges.

11. For the reasons recorded above, I hold that the appeal has no merits and both the Courts below have rightly come to the conclusion that the suit deserves to be dismissed.

12. In the result, both the appeals fail and stand dismissed with no order as to costs.

(P.V. Kakade, J.)